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12 UNITED STATES DISTRICT COURT
13 EASTERN DISTRICT OF CALIFORNIA

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15 UNITED STATES OF AMERICA,

CASE NO. 2:20-CR-00175-TLN

16 Plaintiff,

UNITED STATES'S SENTENCING
17 MEMORANDUM

18 v.

DATE: July 20, 2023

19 KRISTY LYNN FELKINS,

TIME: 9:30 a.m.

20 Defendant.

COURT: Hon. Troy L. Nunley

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SENTENCING MEMORANDUM

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A. Introduction

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The United States files this Sentencing Memorandum in advance of the Judgment and Sentencing Hearing set for July 20, 2023. At the hearing, the United States will join the recommendation of the Probation Officer that the Court sentence the defendant to 87 months of incarceration, 36 months of supervised release, and a \$100 special assessment.

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B. No Objections to the Presentence Investigation Report

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On May 16, 2023, the Probation Officer filed the Presentence Investigation Report. PSR, ECF 50. The United States has reviewed the PSR and has no objections to the factual findings and guideline calculations. The Court should adopt the factual findings and guideline calculations in the PSR.

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1 **C. Defense Objection to the PSR**

2 On June 20, 2023, the defendant filed a formal objection to the PSR. ECF 51.
3 Although styled as a formal objection, the objection is ultimately a policy disagreement
4 with the correctly-applied Guideline. ECF 51 at 1 (“This Court should disregard the
5 guidelines as applied to this case as they were not based on any empirical evidence and do
6 not make good policy sense.”). The Court should overrule the objection and instead
7 consider the defendant’s policy objection as a request for a variance under 18 U.S.C.
8 § 3553(a). *See Kimbrough v. United States*, 552 U.S. 85 (2007) (discussing that courts may
9 vary from the advisory guideline range based on a policy disagreement with the
10 Sentencing Guidelines).

11 The Probation Officer correctly calculated the advisory guideline range. In the PSR,
12 the Probation Officer first determined that the applicable guideline range for the offense of
13 conviction (18 U.S.C. § 1958 – use of interstate commerce facilities in the commission of
14 murder-for-hire) is §2E1.4 based on the Statutory Index in Appendix A. Guideline §2E1.4
15 in turn directs that the base offense level should be the greater of: (1) 32 or (2) the offense
16 level applicable to the underlying unlawful conduct. The underlying unlawful conduct in
17 this case is solicitation to commit murder. The applicable guideline for solicitation to
18 commit murder is §2A1.5 and the base offense level under §2A1.5 is 33. Therefore, in the
19 PSR, the Probation Officer correctly determined the base offense level to be 33 based on
20 application of §2A1.5. PSR ¶ 24.

21 The defendant objects to application of USSG §2A1.5 to set the base offense level.
22 ECF 51 at 1. Instead, the defendant argues that the correct guideline is §2E1.4. The
23 defendant is wrong. In *United States v. Temkin*, the district court did exactly what the
24 defendant is now asking this Court to do, use §2E1.4 instead of §2A1.5 to set the offense
25 level for a § 1958 conviction. In that case, the Ninth Circuit found that the district court
26 committed procedural error. *United States v. Temkin*, 797 F.3d 682, 693-695 (9th Cir.
27 2015) (“Temkin’s offense level should have been set by U.S.S.G. § 2A1.5”). This Court
28 should overrule the objection because the Ninth Circuit—following the First and Eighth

1 Circuits—explicitly held that the applicable guideline for a § 1958 conviction is §2A1.5.

2 **D. Application of Prospective Change to Sentencing Guidelines**

3 The defendant asks the Court to apply a two-level reduction in the defendant's
4 offense level based on a proposed change to the Sentencing Guidelines. ECF 51 at 6–7.
5 The Court should decline to apply the requested two-level reduction when calculating the
6 applicable sentencing guideline range. The Court is required to apply the version of the
7 Guidelines in effect at the time of sentencing. *See* 18 U.S.C. 3553(a)(4)(A)(ii); U.S.S.G. §
8 1B1.11(a). Unless Congress provides otherwise, a proposed Guidelines amendment takes
9 effect only after a prescribed period of congressional review has elapsed. *See* 28 U.S.C.
10 994(p); *Stinson v. United States*, 508 U.S. 36, 41 (1993) (“Amendments to the Guidelines
11 must be submitted to Congress for a 6-month period of review, during which Congress can
12 modify or disapprove them.”). In this instance, absent Congressional action, the
13 amendment will not take effect until November 1, 2023. If the Court is inclined to apply
14 the two-level reduction before it takes effect, the Court must calculate the Guidelines
15 range under the current version of the Guidelines first. Then, the Court may vary
16 downward, in light of the amendment. If the Court varies downward, the United States
17 asks that the court clearly state that the variance is as a result of the amendment so that
18 the defendant will not receive a further reduction if and when the amendment becomes
19 retroactive.

20 **E. Victim Allocution**

21 The victim in this case will be personally present at sentencing on July 20, 2023.
22 Pursuant to Rule 32(i)(4)(B), the victim wishes to personally address the Court regarding
23 sentencing. Fed. Rule Crim. P. 32(i)(4)(B) (“Before imposing sentence, the court must
24 address any victim of the crime who is present at sentencing and must permit the victim
25 to be reasonably heard.”).

26 **F. Sentencing Recommendation**

27 The United States joins the recommendation of the Probation Officer that the Court
28 sentence the defendant to a term of incarceration 87 months. In addition, the United

1 States recommends that the Court sentence the defendant to a term of supervised release
2 of 36 months and a \$100 special assessment.

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4 Dated: July 13, 2023

PHILLIP A. TALBERT
United States Attorney

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6 By: /s/ JUSTIN L. LEE
7 JUSTIN L. LEE
8 Assistant United States Attorney

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